No. 2901.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Enrique Flores Magon and
Ricardo Flores Magon,
Plaintiffs in Error,
vs.
The United States of America,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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Plaintiffs in error in this case (hereinafter called the defendants) were convicted under section 211 of the Federal Penal Code, as amended by the Act of March 4, 1911; the amendment reading:

> "And the term 'indecent' within the intendment of this section shall include matter of a character tending to incite arson, murder or assassination."

The indictment under which these defendants were convicted contained three counts. They were convicted upon the second and third counts and acquitted on

the first count. The particular matter complained of as "indecent" within the intendment of the statute, is as follows:

Second Count.

"Justice, and not bullets is what ought to be given to the revolutionists of Texas, and from now on we should demand that those persecutions to innocent Mexicans should cease, and as to the revolutionists, we should also demand that they be not executed (shot).

"The ones who should be shot are the 'rangers' and the band of bandits who accompany them in their depredations."

* * * * * * * *

"Enough of reforms! What we hungry people need is entire liberty based on economic independence. Down with the so-called rights of private property, and as long as this evil right continues to exist we shall continue under arms. Enough with mockery! Poor people, whoever speaks to you about Carranzismo, spit in their face and break their jaws.

"Long live land and Liberty!"

Third Count.

"So you see, brother Carrancistas, the problem which is going to be solved by the rebels who retain their arms, when Carranza becomes president, is the same problem that you will have to decide, because it affects you in the same manner. Your duty is to help and for this purpose do not surrender your arms when the troops are ordered disbanded. What you should do at such a time, or before, if possible, is to rebel, turn your arms against your chiefs and officers and without

trembling pulse open fire with your rifles, because they are your enemies, and are concerned in having these conditions last forever, so they can have a life of privilege.

"A strong heart, a firm pulse and steady aim is all you need to exterminate your immediate oppressors.

"If you surrender your arms you will return to your home in poverty, ready to sell your blood and strength to the rich at their own price.

"You will have accomplished nothing, but in the meantime your chiefs and officers will enjoy, in the city, all kinds of pleasures and honors and display on their breasts crosses and medals. If you remain in the Carranza army as a permanent soldier you will be a bad man, an executioner of YOU brothers of your class because you will help to serve the rich.

"Honor points to the road you should take; rebel against all governments until you attain the triumph of the principles comprised in the declaration of the 23 of September, 1911, expedited by the 'Mexican Liberal Party,' principles that advocate the death of Capital, or Authority and the clergy of all religions.

"Decide to follow this road. Don't be deceived by the specious arguments of alleged wise politicians, these same arguments were used by the enemies of the great French revolution to prevent people from obtaining their political liberty. It was the argument of Profirio Diaz to prevent you from obtaining your liberties; it is also the argument of the Carranza party used to prevent you from obtaining your economic liberty, which is the foundation of all liberties. This means the privilege of earning your living by working for yourself and being independent, and this can only be ob-

tained, understand, by expropriation of land, houses, machinery, means of transportation and merchandise, becoming common property without the distinction of men or women, race or color. He who tells you the contrary, spit in his face, and even kill him, because it is necessary, it is absolutely necessary to initiate a revolutionary campaign of house-cleaning.

"We, the disinherited, must rid ourselves of those who are in our way, if we can, by hook or crook, the same as we get rid of the tiger, as we annihilate the rattlesnake, as we *scruch* the tarantula. Those who tell you that they are not prepared for this or other conquests which benefit you are the ones who have interest in delaying your emancipation so that in the meantime they can live at your expense."

The transcript of record does not purport to set out any testimony introduced on behalf of the Government to establish the guilt of the defendants and it only sets out the testimony of the two defendants themselves. We must, therefore, conclude that the Government proved every element of the crime necessary for the conviction of these defendants. Further, the defendant Enrique Flores Magon admitted that he owned the paper "Regeneracion," and printed and published the same at Los Angeles, and that this paper contained the articles objected to, as set out in the indictment; and Ricardo Flores Magon admitted that he was the writer of the objectionable articles.

ARGUMENT.

We will take up the points argued by counsel for plaintiffs in error, in the order in which he has argued them in his brief. On page 12 *et seq.* of his brief, he argues at great length that the indictment is bad for uncertainty, for the reason that it cannot be definitely ascertained what the clause "matter of a character tending to incite arson, murder or assassination" means, and that the same is so vague and indefinite that the statute is absolutely void, in accordance with the maxim *"Ubi jus incertum, ibi jus nullum."* He argues that what one jury might find would incite a man to arson, murder or assassination, another jury would find to be "a perfectly legitimate expression of righteous indignation, or a mere ardor of sentiment, or at most, a verbal indiscretion, or only a piece of rant or harmless levity or innocuous braggadocio."

Counsel states that this is probably the first prosecution under this amendment to section 211. We also have searched the books for a reported case brought under this amendment, but have failed to find any, so, in order to establish the validity of this amendment, we must look to the reported decisions under the statutes of the United States similar to this one. Before this amendment the statute read:

> "Every obscene, lewd, or lascivious, and every filthy, book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character and every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and every article, instrument, substance, drug, medicine, or thing which is advertised or

described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information directly or indirectly, where, or how, or from whom, or by what means any of the hereinbefore-mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance; and every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can be, used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing, is hereby desclared to be nonmailable matter and shall not be conveyed in the mails or delivered from any postoffice or by any letter carrier."

Now, the argument of counsel would be as applicable to the section before amendment, as it would be to the amendment, for obviously what to a moral man would be obscene, lewd, lascivious and filthy, on an immoral man or an unmoral man would have no effect whatever. Likewise, a jury in one community might find that a

writing was obscene, lewd and lascivious, and a jury in another district might find that the same writing was harmless. In this connection the court in the case of Croomer v. United States, 213 Fed. 1, states:

> "It is also said that because of the uncertainty in the test of obscenity there is a total absence of criteria of guilt, and therefore that the statute cannot constitute due process of law; that the equality required thereby is violated; that the law is violative of the constitutional guaranty against *ex post facto* laws; and that the defendant is not informed of the nature of the accusation against him. Section 211 of the Criminal Code is, with a few slight changes, a re-enactment of section 3893 of the Compiled Statutes. The only change that could affect the construction heretofore placed upon section 3893 by the courts is the addition of the words "and every filthy book, pamphlet," etc. These words certainly do not tend to narrow the scope of the statute. Without discussing them separately, it is sufficient to say that all of the questions suggested by counsel affecting the constitutionality of this section of the Code have been before the courts in construing section 3893, and by an almost unbroken line of authority have been held to be without merit."

In construing this statute, it has always been held that if the particular matter complained of were of such a nature that the reading would, in the opinion of reasonable persons, or the jurors selected to try one charged with violating this section, tend to deprave or corrupt the morals of reasonable persons, and would suggest to the minds of either sex thoughts of an im-

pure or libidinous character, it is within the prohibition of the statute.

U. S. v. Musgrave, 160 Fed. 700;
Macfadden v. U. S., 165 Fed. 51;
Knowles v. U. S., 170 Fed. 409;
Demolli v. U. S., 144 Fed. 363;
Rosen v. U. S., 161 U. S. 29.

It will thus be seen in all these authorities the test of the obscenity of the objectionable matter, is the tendency to deprave and corrupt the minds of those who are open to such influence into whose hands the publication may come.

Now, in the case at bar, the test is the tendency to incite in the minds of those into whose hands the publication might fall, arson, murder or assassination, and in each instance it must be for the jury to determine whether or not the writing complained of is of the prohibited character.

Likewise a portion of section 211 reads:

> "And every article, instrument, substance, drug, medicine or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose."

Here again we have practically the same situation as that arising in the amendment. What one jury might find was advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, another jury might find was absolutely incapable of such a construction, and,

in our view, the amendment under which this indictment was brought is as definite and certain as those portions of the statute which have heretofore been uniformly held to be good by all the courts of the United States.

Section 212 of the Federal Penal Code reads as follows:

> "All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another, may be written or printed or otherwise impressed or apparent, are hereby declared nonmailable matter, and shall not be conveyed in the mails nor delivered from any post-office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the postmaster-general shall prescribe."

Here also it is left to the jury to determine whether or not the delineations, epithets, terms or language, etc., are "calculated by the terms or manner or style of display, and obviously intended to reflect injuriously upon the character or conduct of another," and this statute has likewise uniformly been held to be good.

Again, the famous fraud section of the Federal Penal Code, section 215, is of the same character, in that a jury must determine (1) that there was a scheme or artifice to defraud devised by the defendant, (2) that the scheme or artifice to defraud was to be

effected by correspondence through the postoffice establishment of the United States, and (3) that a letter or package was actually placed in the postoffice or received from the postoffice of the United States, which package or letter was in furtherance of such scheme or artifice to defraud. Here also the duty rests on the jury to decide questions of equal uncertainty as those they were called upon to decide in the case at bar. This statute has likewise been uniformly held to be good.

Let us look at it from another angle. Under the common law there was such a thing as an accessory before the fact, and while accessories before the fact have now been made principals in federal cases, by statute, yet the analogy between an accessory before the fact and a person violating this amendment to 211, is very close. An accessory before the fact might become guilty by his words of counsel or advice to another to commit a crime, provided the crime were committed. It then devolved upon the jury to pass upon whether or not the counsel which the accessory gave the principal was such as would tend to incite him to the commission of the crime. This is essentially the case at bar, for it is for the jury to say whether the words or council in the objectionable articles would incite another to commit arson, murden, or assassination.

We are unable to distinguish between the duty devolving upon a jury trying a case under any of these statutes above cited, and that devolving upon a jury trying a case under the amendment to section 211. We have no fault to find with the principles of law laid

down in the argument of counsel for defendants for the determination of the validity of a statute, but we are frank to say that we do not see how they are applicable in any manner to the statute under which this prosecution is brought.

Specification of Error No. 7.

This specification of error has to do with the alleged invalidity of the indictment, for the reason that the newspapers placed in the postoffice were not described as being addressed to any parties whomsoever. In this connection the indictment states "that Enrique Flores Magon, Ricardo Flores Magon and Wm. C. Owen * * * did, knowingly, willfully, unlawfully and feloniously deposit and cause to be deposited in the postoffice and the stations thereof * * * a newspaper published and printed in the said city of Los Angeles and named and called "Regeneracion," which said newspaper did then and there contain certain indecent, vile and filthy substance and language, and which said newspaper was a publication of an indecent character, and which said indecent, vile and filthy substance and language was of a character tending to incite in the minds of persons reading the same, murder and assassination * * * And said newspaper of said indecent character was so deposited and caused to be deposited in said United States postoffice at said city of Los Angeles to be transmitted by the postoffice establishment to many and divers persons within the United States of America and within the Republic of Mexico; the names of which divers persons are unknown to the grand jurors."

Counsel relies upon the case of the United States v. Brazeau, 78 Fed. 464, in his argument on this point; and while this case has been cited with approval in other later cases where the validity of an indictment was in question, so far as we have been able to ascertain, it has never been cited with approval upon the point that an allegation that the letters or newspapers mailed were addressed is a necessary allegation in an indictment under section 211.

In the case of Durland v. United States, 161 U. S. 306, the court states:

> "The second (assignment of error), which applies more fully to the first than the second case, is that the indictment is defective in that it avers that in pursuance of this fraudulent scheme twenty letters and circulars were deposited in the post-office, without in any way specifying the character of those letters or circulars. It is contended that the indictment should either recite the letters, or at least, by direct statements, show their purpose and character, and that the names and addresses of the parties to whom the letters were sent should also be stated, so as to inform the defendant as to what parts of his correspondence the charge of crime is made, and also to enable him to defend himself against a subsequent indictment for the same transaction. These objections were raised by a motion to quash the indictment, but such a motion is ordinarily addressed to the discretion of the court, and a refusal to quash is not, generally, assignable for error. Logan v. United States, 144 U. S. 263, 282.
>
> "Further, the omission to state the names of the parties intended to be defrauded and the names and addresses on the letters is satisfied by the

allegation, if true, that such names and addresses are to the grand jury unknown. And parol evidence is always admissible, and sometimes necessary, to establish the defense of prior conviction or acquittal. Dunbar v. United States, 156 U. S. 185, 191.

"It may be conceded that the indictment would be more satisfactory if it gave more full information as to the contents or import of these letters, so that upon its face it would be apparent that they were calculated or designed to aid in carrying into execution the scheme to defraud. But still we think that as it stands it must be held to be sufficient. There was a partial identification of the letters by the time and place of mailing, and the charge was that defendant 'intending in and for executing such scheme and artifice to defraud and attempting so to do, placed and caused to be placed in the postoffice,' etc. *This, it will be noticed, is substantially the language of the statute. If defendant had desired further specification and identification, he could have secured it by demanding a bill of particulars.* Rosen v. United States, 161 U. S. 29." (Italics ours.)

In the indictment under which this prosecution is brought we have every element specified as necessary in the Durland case. The pleader has stated that the names of the people to whom these papers were to be sent are unknown to the grand jurors, but that they were deposited for mailing and delivery to such persons in the United States and Mexico. Obviously, the name is a material part of the address, and it being alleged that the names are unknown to the grand jurors, the requirements as set out in the Durland case are fully and completely met.

Counsel also cites the case of the United States v. Harris, 122 Fed. 551, in support of his contention in that case, but Judge Hawley distinctly says:

> "Counsel for defendant has, in support of his motion, called my attention to several authorities —among others, United States v. Brazeau (C. C.), 78 Fed. 464—where it was held that, in an indictment for depositing in the mails newspapers containing obscene matter, it was essential that the indictment should aver that the newspapers were addressed. The correctness of that opinion, as applied to the facts of that particular case, will not be questioned; but I am unable to agree with the statement therein made that 'the statute does not make criminal the mere depositing in the postoffice of obscene matter,' or that the intent of the defendant in depositing a letter or paper to employ the mails for the transmission of obscene matter must be averred. I am of the opinion, after a careful reading of the language of the statute, that the gist of the offense consists in the depositing, or causing to be deposited, to be conveyed or delivered by the mail, any letter containing or relating to the prohibited matter, and that the address goes only to the point of the identification of the letter alleged to have been deposited, or caused to be deposited, and indicating to whom or where it is to be conveyed. United States v. Lynch (D. C.), 49 Fed. 851; United States v. Janes (D. C.), 74 Fed. 545; United States v. Fulkerson (D. C.), 74 Fed. 631, 633. The statute does not, in terms, declare that the letter should be enclosed in an envelope or wrapper containing the address of the person to whom it was to be sent, or that the postage thereon should be paid."

Here we have the precise position taken by the Government in this case, namely: that the address is merely a matter of description and not a necessary allegation in the indictment.

In the case of the United States v. Lynch *et al.*, 49 Fed. 851, Judge Ross, sitting as a district judge, in passing upon a demurrer to the section of the revised statutes now included in section 213 of the Federal Penal Code, said in part:

> "The address goes only to the point of the identification of the paper alleged to have been deposited and caused to be deposited and to indicate to whom or where it is to be conveyed and delivered. The gist of the offense consists in the depositing or causing to be deposited, to be conveyed or delivered by mail, any newspaper containing or relating to the prohibited matter."

Specification of Error No. 8.

Counsel contends that the indictment is further defective, in that it contains no averment that the newspapers were non-mailable. We are unable to see any force whatever in the argument on this point. The indictment follows the language of the statute in describing the objectional articles contained in the newspapers, and while it is not alleged that the newspapers were non-mailable, it is alleged that they contained everything necessary to bring them within the non-mailable class, and we fail to see how the use of the word "non-mailable" would add anything to the force of the language used in the indictment.

Counsel relies upon the case of the United States v. Clifford, 104 Fed. 296, in support of his position on this point, but the most casual reading of the Clifford case will show that the district judge was absolutely correct in his decision in that case on the sufficiency of the indictment in its charging part. The indictment in that case merely charged:

> "Unlawfully, did knowingly deposit, and cause to be deposited, at the city of Martinsburg, in said district, in the postoffice of the said United States there, for mailing and delivery, certain printed newspapers, to-wit, fifty printed newspapers, then and there addressed to divers persons, respectively, which said persons are to the grand jurors aforesaid unknown, and each then and there containing, amongst other things, the following matters in point; that is to say"

Thereupon the pleader sets out in full the articles said to have been mailed by the defendant; but in no place in that indictment was it alleged that the matter complained of was of the character prohibited by section 211, to-wit, obscene, lewd, lascivious, filthy or indecent. The case is essentially different from the case at bar and has no bearing upon this point.

Specification of Error No. 9.

Counsel in this specification of error alleges that the indictment is insufficient because it does not appear therefrom that the defendants, or either of them, knew that the papers alleged to have been deposited by them in the postoffice contained indecent matter or knew its import, or that it was of a character tending to incite

murder or assassination. In support of his decision he cites several cases which are more or less old.

The indictment in its charging parts states that the defendants "did *knowingly,* willfully, unlawfully and feloniously," etc. We believe that the word *"knowingly,"* as thus used, applies to every part of the offense as described thereafter.

The Circuit Court of Appeals, Fifth Circuit, in the case of Stayton v. United States, 213 Fed. 224, said:

> "The plaintiff in error was convicted under article 211 of the Penal Code (Act of March 4, 1909, C. 321, 35 Stat. 1129 (U. S. Compt. St. Supp. 1911, p. 1651) under an indictment charging that she did
>
> " 'Unlawfully, feloniously, and knowingly deposit and cause to be deposited in the United States postoffice at Ft. Worth, Texas, for mailing and delivery, a certain letter giving information as to where an act producing abortion could be had, done, and performed.'
>
> "The only error assigned in this court is that the court overruled the preliminary motion to quash the indictment:
>
> " 'Because the said indictment nowhere directly or indirectly charges that this defendant had any knowledge of the contents of the letter complained of at the time she is alleged to have deposited the said letter in the postoffiice at Ft. Worth, Tex., for the purpose of mailing. A knowledge of the contents of the letter at the time of the mailing is a necessary ingredient of the offense, and must be alleged and proven by the Government before a conviction can be had under article 211 of the Penal Code of the United States.'

> "Our examination shows no error in the ruling. United States v. Purvis (D. C.), 195 Fed. 618, and authorities there cited; Price v. United States, 165 U. S. 311, 312, 17 Sup. Ct. 366, 41 L. Ed. 727."

The Supreme Court in the case of Price v. United States, cited in the foregoing opinion, held an indictment in almost identically the same words in the charging part as this indictment, to be good, and that the word "knowingly" applied to every element of the offense as described.

In the case of Rosen v. United States 161 U. S. 29, cited by counsel for defendants, the Supreme Court held an indictment in this language to be good.

The Clifford case, relied upon by counsel for defendants, would thus seem to be directly in conflict with these cases which are ruling and controlling, and, therefore, it cannot be followed.

We come now to the discussion of counsel for the plaintiffs in error of specifications of error numbers 11, 12, 5 and 10, on page 39 *et seq* of his brief. Numbers 11 and 12 have to do with the district court sustaining an objection propounded to the defendants on direct examination, which question was as follows: "At the time you deposited or caused to be deposited in the mail the alleged non-mailable matter set out in the second and third counts of the indictment, did you know such matter to be of a character tending to incite murder or assassination?"

Counsel argues that inasmuch as the offense was charged to be knowingly and willfully done, intent was

an element of the offense, and cites authorities to the effect that when intent is an element of the offense, it is error for the district court to refuse to allow the defendant to testify as to his intent. But counsel is mistaken in his application of those principles to this case. The words "knowingly" and "willfully" go no further than to the effect that the defendants knowingly and willfully caused the newspapers containing the objectionable articles to be introduced into the United States mails; and, whether or not they considered these articles to be of a character which would incite murder or assassination is of no weight whatever in determining their guilt.

In a prosecution under this section, before it was amended, the Supreme Court said, in Rosen v. United States, 161 U. S. 41:

> "At the trial below the defendant, by his counsel, asked the court to instruct the jury that he should be acquitted if they entertained a reasonable doubt whether he knew that the paper or publication, referred to in the indictment, was obscene. This request was refused, and an exception was taken to the ruling of the court.
>
> "This request for instructions was intended to announce the proposition that no one could be convicted of the offense of having unlawfully, wilfully, and knowingly used the mails for the transmission and delivery of an obscene, lewd, and lascivious publication—although he may have had at the time actual knowledge or notice of its contents—unless he knew or believed that such paper could be properly or justly characterized as obscene, lewd, and lascivious. The statute is not to be so interpreted. The inquiry under the statute is whether

> the paper charged to have been obscene, lewd, and lascivious, was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice at the time of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States. The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute has been violated. Every one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd and lascivious."

Applying this principle to the case at bar, it was not for the defendants to say whether or not the matter was of the character alleged, but for the jury, and the fact that they did or did not know that such matter would incite others to murder or assassination could in no wise be a defense to the action; therefore, if it would avail them nothing, the question was immaterial, irrelevant and incompetent, and the trial court was right in refusing to allow the defendants to express their opinion as to the objectionable character of the matter complained of.

Counsel then proceeds to argue that Congress overstepped its rights, when it enlarged the meaning of the word "indecent" to include matter of a character tending to incite murder, arson or assassination. Philologically speaking, this word may not have the meaning attributed to it in this statute, but undoubtedly Congress has a right to prohibit matter of a character tending to incite arson, murder or assassination from the mails, and if it has that right, it must have the further right to determine under which section of its laws such a prohibitive measure should be included; and in this case it has determined that the prohibited matter should be included under section 211, by enlarging the meaning of the word "indecent" to cover matter of a character tending to incite murder, arson or assassination. This contradicts no legal rule, so far as we have been able to ascertain, nor does it savor of undue process, or is it in the nature of an *ex post facto* law, and we are unable to perceive why Congress was not acting well within its rights when it passed this amendment. The word "decent" comes from the Latin root "decens," which means "to be fitting or becoming, akin to glory, honor, ornament, to seem good, to seem, think, to be gracious." The addition of the prefix "in" to this root gives us the word "indecent," and "in" in this sense would mean contrary to those things above stated. So, it is not such a far-fetched interpretation which Congress has given to this word as counsel would lead us to believe.

The case of Rosen v. United States, 161 U. S. 41 above, set out in the argument on specifications of error

numbers 11 and 12, is sufficient answer to the contention of counsel for defendants, on page 41, and designated by the Roman numeral III, wherein he asks the question:

> "Did the defendants know, or could they have known that the printed matter claimed in the indictment to be non-mailable was 'indecent' or that it was 'of a character tending to incite, in the minds of persons reading the same, murder and assassination' in the language of the indictment, or of a character tending to incite murder or assassination in the language of the statute?"

Counsel then proceeds to give us a history of Mexico, and the reasons why the defendants wrote and circulated the matter complained of. We are not interested in the history of Mexico, or what actuated these defendants to write and publish these articles and deposit them in the mail. The only thing that interests us is whether or not the articles are of the prohibited character mentioned in the statute, and the jury found that this was the case.

We come last to the point argued on page 52 *et seq* of the brief of counsel for defendants, under the title "Freedom of the Press." This is the final argument of most people, and, particularly the peculiar party with which these defendants are affiliated, viz.: anarchists, who find themselves in the toils of the law for publishing and circulating literature of a forbidden kind. Their one and great cry is that they are protected by the constitution of the United States in saying what they please and in publishing what they

please, if they are sincere and believe that good will be accomplished thereby.

In the case of Coomer v. United States, 213 Fed. 1, the court said that this statute, before the 1911 amendment by an almost unbroken line of authority, had been found to be constitutional.

In the case of the United States v. Journal Co., 197 Fed. 415, reading from page 418, the court said:

> "The defendant insists that the indictment in this case should not be sustained because the same is in derogation of its constitutional rights and privileges as the publisher of a daily newspaper. Amend. I, Const. U. S. This position cannot be successfully maintained as the constitutional guaranty of a free press cannot be made a shield from violation of criminal laws, which are not designed to restrict the freedom of the press, but to protect society from acts clearly immoral or otherwise injurious to the people. The postal service is one of the agencies of the Federal Government that it has the right under the constitution to maintain, and under it, and the laws passed in pursuance thereof, as well as what may be termed its police authority respecting the subject, it has the right to determine the manner and method of conducting the same, and to exclude therefrom what may be considered injurious to public morals, and in so doing it neither restricts nor deprives the press of any constitutional privilege or right. It simply declines to become an agency for the distribution and circulation of printed and other matter which it considers of an objectionable character; and it doubtless is within the power of the Government to withdraw or discontinue its postal system en-

> tirely. *Ex parte* Jackson, 96 U. S. 727, 736, 24 L. Ed. 877; *In re* Rapier, 143 U. S. 110, 133, 134, 12 Sup. Ct. 374, 36 L. Ed. 93; Public Clearing House v. Coyne, 194 U. S., 497, 506, 24 Sup. Ct. 789, 48 L. Ed. 1092; Knowles v. United States, 170 Fed. 409, 411, 95 C. C. A. 579, *supra,* and cases cited; Watson on the Constitution, 6441, 648, 649, 650.
>
> "In *ex parte* Jackson, 96 U. S. 732, 24 L. Ed. 877, *supra,* Mr. Justice Field aptly remarked the difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail."

It will thus be seen that this statute has been held to be constitutional and not to abridge any constitutional rights prior to the amendment of 1911. The amendment does not change the character of the statute, but simply enlarges it, and we see no reason why these authorities above cited should not apply equally to the amendment as they did to the statute before it was amended.

Counsel concludes his brief with a dramatic appeal that these defendants should not be prosecuted for their error of vision, for, he argues, "they did not know the road, but only saw the goal." It is no fault of the Government officers that these men "did not know the road" and that they find themselves in the position they are now in. They admit that they have been in trouble with the authorities ever since they have been in the United States and that they have served repeatedly

in jails and in penitentiaries for their crimes. They are not entitled to any sympathy and have only themselves to blame. They admit that they are anarchists, and are opposed to all law and government, ~~and~~ as such they are a menace to the community at large, and are safer incarcerated.

For the foregoing reasons, we respectfully submit that the verdict and judgment of the lower court should be affirmed.

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